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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 1084 133

W. COFFEE, INDIVIDUALLY AND AS TRUSTEE FOR RUTH COFFEE COBLE, EDGAR COBLE, ORIN COFFEE, WOODSON COFFEE, JR., RAY C. COFFEE, OLLIE COFFEE WILLIS AND HUSBAND, WADE WILLIS, J. K. COFFEE, AND VELDA BANGS COFFEE,

Petitioners,

vs.

THE SHAMROCK OIL AND GAS CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

RILEY STRICKLAND,
JAMES O. CADE,
Counsel for Petitioners.

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No. 1084

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Petitioners and Appellees Below,

vs.

THE SHAMROCK OIL AND GAS CORPORATION,

Respondent and Appellant Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AT NEW ORLEANS, LOUISIANA, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioners respectfully represent unto the Court as follows:

Summary Statement of the Matter Involved.

(a) *Procedural History.*

This was a suit by Petitioners for an accounting under a mineral lease for 1/8th of the market value, or, if no

legitimate market existed, for the actual or equitable value, of raw natural gas produced on land owned in fee by Petitioners and being taken and processed by the Respondent. The basis of the suit was contractual, and was tried to the Court without a jury (Tr. pp. 10 and 22).

The Trial Court found as follows:

> "That the market relied upon by Defendant (Respondent here) to sustain *market value,* from July 1, 1937 to date of trial was not a free, open and competitive market but was a suppressed market, and such distress price reflected by the use of the *schedules adopted* by the Natural Gasoline Association of America and the payment for the gasoline portion on the field or charcoal test rather than of actual recovery *was not* the regular or *fair market value* at the wells where produced. That the fair market value of said gas at the wells where produced in Moore County, Texas, including the wells involved herein, was 1¢ per m.c.f. during the period of time from July 1, 1937 to December 31, 1941, and was 1.4¢ per m.c.f. from January 1, 1942 to December 31, 1942" (Transcript p. 54).

As will be indicated in the supporting brief appended hereto, this finding of fact by the Trial Court was amply supported by the evidence in every department. A Judgment was entered in accordance therewith (R. 37).

On appeal, the Circuit Court of Appeals disregarded Rule 52-A of the Federal Rules of Civil Procedure by overruling these *findings of fact* by the Trial Court and reversing the case. (140 Fed. (2) 409.)

(b) *Factual History.*

Gas wells are located on lands owned by Petitioners in Moore County, Texas, under lease to Respondent. This gas is utilized to manufacture gasoline and other commodities. *In the beginning of the industry,* nothing was extracted from the raw natural gas except *raw gasoline.*

The balance or *residue* was then burned in specially constructed furnaces and converted into carbon black (R. 253 to 259, incl.).

During that period there was developed what is known as the charcoal field test to determine the *raw gasoline content* of the raw natural gas at the well (R. 508). That this test is comparatively accurate as to gasoline content is not disputed and *has never been an issue* in this case, and the statements of the Circuit Court in its opinion (140 Fed. (2) 409) to the contrary illustrate the confused condition of the reasoning of that Court (Tr. pp. 253 to 259, incl.). *We emphasize that the accuracy of the charcoal test for raw gasoline is not an issue here.*

However, later in the development of the industry, other products besides gasoline and carbon black residue were processed from the raw natural gas. The charcoal test *does not* show (Tr. p. 508) these other products at all. (Tr. p. 247). That is the issue.

Early in the history of the industry, and prior to the period involved in this case, the Natural Gasoline Association of America, whose membership is composed exclusively of *buyers of raw natural gas*, promulgated what is commonly called the NGAA Contract (Tr. pp. 447 to 455). Petitioners have never executed that Contract (Tr. p. 484 and 514). Many royalty and land owners have refused to execute it. It provides for the determination of market value of this gas, at the well, by a certain fixed formula (Tr. pp. 484 & 514).

The NGAA Contract schedule for determining the market value at the mouth of the well uses the charcoal test to determine *raw gasoline content*, and this is accurate (Tr. p. 508). The schedule further provides that the royalty owner's market price at the well is determined by deducting 50% of market price of the carbon black residue gas for the cost of processing, and the current price of

raw gasoline is computed as a factor after an arbitrary deduction of about 75% for the cost of processing. These two factors have been arbitrarily adopted by Respondent as fixing "market value" (Tr. p. 484-485).

No complaint has been made *in this suit* as to either of these practices as such, inequitable though they may be. The issue here lies in the fact that the NGAA method of computing market value as above outlined *does not take into account* the *butanes* and *propanes* processed from this gas. These are highly developed and widely marketed as farm fuels and commercial fuels (Tr. pp. 236, 237 and 256). *The charcoal test does not show these butanes and propanes* (Tr. p. 508), and as a result, during a larger part of the period covered by this lawsuit they were ignored as factors affecting the true market value of gas, that is, they were not considered at all in computing so called "market value" (Tr. pp. 233 to 259).

The Record shows that royalty owners generally, and Petitioners in particular, were forced to accept this NGAA method of computing their royalties, whether they had executed the contract or not (Tr. p. 485). And Petitioners *had not* (Tr. p. 484). The Respondents, and other major producers, being in ownership or in contractual operation of the leases on these lands, simply paid the NGAA price and refused to consider anything else (Tr. p. 485).

It was this NGAA market, relied upon by Respondent (Tr. p. 485), that the Trial Court referred to in the *Finding of Fact*, quoted above, as not being "free, open and competitive" and as being "a suppressed market."

On the basis of prices actually paid for this raw natural gas at the mouth of the well by independent purchasers in this field (Tr. pp. 253 to 259), that is, by purchasers who were not *members* of NGAA, the Trial Court further found the *fair market* value of this gas as outlined in the last sentence of the *Finding of Fact* quoted above.

The Circuit Court of Appeals disregarded Rule 52-A and overruled these Trial Court Findings of Fact. This resulted largely, we think, from the failure of the Circuit Court to get in mind the true factual history of the case. The Circuit Court seemed to act on the premise that we had challenged the *accuracy* of the charcoal test, and never did see the real issue, that is, that there was *no test* at all (Tr. p. 508), and *no payment* at all for most of the period covered by this law suit for that very valuable component of our raw gas,—*the butanes and the propanes and other lighter liquids* produced from Petitioner's gas and sold by the Respondent.

Reasons Relied On for the Allowance of the Writ.

I.

The Circuit Court of Appeals has written an opinion in this case adversely affecting millions of dollars valuation of gas royalties owned by the public and landowners generally throughout the vast oil and gas producing areas of the United States in that said Circuit Court has held, in effect, that processors of natural gas need not account to their royalty owners for a most valuable component,—Butanes and propanes,—of their gas. This presents, therefore, a vital question of vast public importance.

II.

The Circuit Court of Appeals in this case has rendered a decision affecting an important question of federal law which has not been, but should be, settled by this Court, as to whether or not the operation of the major gas buyers under the NGAA buying schedule constitutes a restricted or monopolistic market practice under the United States Anti-trust laws.

III.

The Circuit Court of Appeals has in this case rendered a decision affecting an important question of federal constitutional law, which has not been, but should be, settled by this Court, in that the Circuit Court has held, in effect, that the major buyers and processors of natural gas, in cases where it is customary to compute the market value of raw gas at the well by considering the market price of components thereof after processing, may arbitrarily refuse to take into account in such computation the market price of butanes and propanes, which are vital components of the raw gas; thus validating by decree and language of the Circuit Court the taking of such property by such major producers without compensation and without due process of law and in violation of Amendment V and Amendment XIV of the United States Constitution. (*Walker* v. *McLoud*, 204 U. S. 309 and *Fayerweather* v. *Ritch*, 195 U. S. 298).

IV.

The Circuit Court of Appeals has in this case rendered a decision in conflict with decisions of other Circuit Courts in the following cases: *Chin* v. *Llan Gollen*, 199 Fed. (2) 66; *Gray* v. *United States*, 109 Fed. (2) 728; *Chain O'Mines* v. *United Gilpin Corp.*, 109 Fed (2) 930; *Pressed Metals of America, Inc.* v. *Woolworth*, 119 Fed. (2) 210; *Luziers* v. *Nee*, 106 Fed. (2) 130; *United States* v. *Adler*, 107 Fed. (2) 987; *Snap Oil & Realty Co.* v. *Elbert*, 108 Fed. (2) 661 by overruling a Finding of Fact by the Trial Court which is supported by the evidence.

V.

The Circuit Court of Appeals in this case has rendered a decision in conflict with a decision of the Circuit Court of Appeals for the Third Circuit in the case of *Heiner, Collector of Internal Revenue* v. *Crosby*, 24 Fed. (2) 191; in

that the Circuit Court in this case has held that *sales in a restricted market fixed fair market value*. The Third Circuit held exactly to the contrary.

VI.

The Circuit Court of Appeals in this case has rendered a decision in conflict with the following decisions of other Circuit Courts: *L. & N. R. R. Co.* v. *Western Union Telegraph Co.*, 249 Fed. 385; *North American Telegraph Co.* v. *Northern Pacific Ry. Co.*, 254 Fed. 417; *Walter* v. *Duffy*, 287 Fed. 41; In re *Schuyler et al.*, 63 Fed. (2) 241; *Logan* v. *Com'r*, 42 Fed. (2) 193; *Weed* v. *Lyons Co.*, 294 Fed. 725; such conflict being that the Circuit Court in this case has, in effect, held that the Trial Court should have determined *fair market value* by the "yardstick" of a restricted and suppressed market under the NGAA schedule, while all the other decisions here cited hold exactly to the contra.

VII.

The Circuit Court of Appeals in this case has decided this case by rendering an opinion in conflict with applicable decisions of the Supreme Court of the United States in the following cases: *M. & R. River Boom Co.* v. *Patterson*, 98 U. S. 403 and *United States* v. *Chandler-Dunbar* Co., 229 U. S. 53, 33 S. Ct. 667; such conflict being that the Circuit Court in this case has, in effect, held that the Trial Court should have determined *fair market value* by the "yardstick" of a restricted and suppressed market under the NGAA schedule, while the Supreme Court has held exactly to the Contra in the cases here cited.

VIII.

The Circuit Court of Appeals in this case has decided this case by rendering an opinion in conflict with applicable decisions of the Supreme Court of the United States in the following cases: *U. S.* v. *Trans-Missouri Freight Assn.*, 17

S. Ct. 540; *U. S.* v. *Joint Traffic Ass'n*, 19 S. Ct. 25; *Montague* v. *Lowry*, 24 S. Ct. 307; *Chattanooga Foundry* v. *City of Atlanta*, 27 S. Ct. 65; such conflict being that the Circuit Court in this case has, in effect, held that the Natural Gasoline Association of America and its promulgated NGAA contract schedule, though "formed for the purpose of fixing and maintaining arbitrary and noncompetitive prices or rates," does not constitute a restricted or suppressed market, which is exactly contra to holdings of the Supreme Court in the cited cases.

IX.

The Circuit Court of Appeals for the Fifth Circuit has, in this and other cases of like import, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision as provided in Rule 38, Par. 5 (b). Hopeless confusion exists among the many decisions of the Fifth Circuit on the questions presented by the case at bar. No oil and gas lawyer could write an intelligent opinion as to how the market value, at the well, of raw natural gas may be properly established or defined after reading the following Fifth Circuit decisions: *Armstrong* v. *Skelly*, 55 Fed. (2) 1066; The *First Sartor Case*, 78 Fed. (2) 924; The *Second Sartor Case*, 84 Fed. (2) 436; The *Pardue Case*, 117 Fed. (2) 225; The *Driskell Case*, 117 Fed. (2) 229; The *Haynes Case*, 123 Fed. (2) 1011; The *Third Sartor Case*, 134 Fed. (2) 433 and 111 Fed. (2) 436, and many others. The Fifth Circuit seems determined not to lay down any definite rule of such a nature as to settle the troublesome and very unsettled controversy between royalty owners generally and major processors generally as to the basis for royalty settlements. A clear cut decision of this vital question, particularly as to the right of the major processors to take butanes and propanes without paying for them,

would clear the Trial Court dockets of much litigation and intercept the filing of many more such law suits.

The inability or refusal of the Circuit Court of Appeals for the Fifth Circuit to grasp this problem squarely, and to fearlessly dispose of it, has created a severe and critical unrest and dissatisfaction generally among the vast army of royalty owners in the great southwest oil and gas producing states. It has jeopardized a vast and universal property of the masses of the people of the gas producing areas. The only solution left is for The Supreme Court to exercise its powers of supervision to the intent that the law be definitely rectified and settled.

Wherefore, your Petitioners pray that a writ of Certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, commanding said Court to certify and send to this Court a full and complete transcript of the Record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 10700, *Shamrock Oil & Gas Corporation, Appellant,* v. *W. Coffee, Individually and as Trustee for Ruth Coffee Coble, et al., Appellees,* to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed and the judgment of the District Court be affirmed by this Court, and for such further relief as to this Court may seem proper.

Dated 17th of May, 1944.

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